IN THE

Supreme Court of the United States

October Term, 1948

No. 271 271.

ALCOA STEAMSHIP COMPANY, INC.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Citations

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, ALCOA STEAMSHIP COMPANY, INC., respectfully prays that a writ of certiorari issue to review an order and judgment of the United States Court of Appeals for the Second Circuit which was entered June 29th, 1949, and which reversed the final judgment of the United States District Court for the Southern District of New York, which was entered May 14, 1948, and dismissed the complaint herein.

Opinions Below

The opinion of the United States District Court for the Southern District of New York, LEIBELL, J. (Trans. Rec. p. 46) was filed on April 30, 1948 and is reported at 80 Fed. Supp. 158. The opinions in the Court of Appeals for the Second Circuit, prevailing opinion by L. HAND, C. J. and dissenting opinion by AUGUSTUS N. HAND, C. J. (Trans. Rec. p. 62) were filed on June 29, 1949, and have not been reported.

Jurisdiction

The order and judgment of the United States Court of Appeals for the Second Circuit, sought to be reviewed was entered June 29, 1949. Jurisdiction to issue the writ requested is found in Title 28, United States Code. Section 1254 (1).

Question Presented

The legal question presented involves the interpretation of the provisions of what is known as the Government Bill of Lading, approved by the Comptroller General August 24, 1928, and employed by the government in all its shipments by common carriers, and of the bill of lading of the carrier. Unless otherwise *specifically* provided or otherwise stated thereon the Government bill of lading is made subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

The precise question is whether a carrier, upon whose ship a government cargo was being carried under a government bill of lading, may recover freight money from the government when the vessel and cargo were lost by enemy action, where the carrier's commercial form of

bill of lading provided that full freight "shall be deemed fully earned and due and payable to the Carrier * * * Goods or Vessel lost or not lost." (Exhibit Volume p. 24a, Plaintiff's Exhibit 10).

Summary Statement of the Matters Involved

This is an action brought by the petitioner against The United States for the recovery under the Tucker Act (Title 28 U.S.C. §1346) of money earned as freight. The United States District Court found in favor of the petitioner and awarded judgment to it. The Court of Appeals for the Second Circuit by a divided court reversed the District Court.

The facts giving rise to the issue are as follows: On or about June 13, 1942 the War Department shipped a government cargo of lumber on the appellee's SS. Gunvor from Mobile, Alabama, to Port of Spain, Trinidad. While on her voyage with that cargo aboard, the ship was lost by enemy action on June 14, 1942. The War Department paid the petitioner's claim for freight; the Comptroller General took exception to the payment and subsequently deducted the amount of that payment from monies admittedly due the petitioner. The action herein was to recover the sum so withheld.

The more pertinent parts of the "government bill of lading" Standard Form No. 1058, approved by the Comptroller General of the United States August 28, 1924, upon which the lumber was shipped, are as follows:

"General Conditions and Instructions
Conditions

"It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier unless otherwise specifically stipulated.

"2 Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

* * * * *

"5. This shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated on the face hereof. * * *". (Plaintiff's Ex. 9, Ex. Vol. 23a).

The usual commercial form of bill of lading then in use by the petitioner contained the following provision as to freight:

"6. Full freight to destination whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to ALCOA STEAMSHIP COMPANY, INC., as soon as the Goods are received for purposes of transportation; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or

after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid). Goods or Vessel lost or not lost. * * *" (Plaintiff's Ex. 10, Ex. Vol. p. 24a).

The Grounds on which the Decisions of the Courts below Rested

There have been three opinions. In the District Court Judge LEIBELL holding for the petitioner, said:

> "If there is nothing in the government's bill of lading, specifically providing to the contrary, i.e., that the freight shall not be earned and due and payable if the goods or vessel are lost, then the sum of $3,520.52 was improperly deducted by the Comptroller General.
>
> "The government contends that the provisions in paragraph 1 of the conditions and in paragraph 2 of the instructions, on the back of the government's bill of lading, are so clearly inconsistent with the provisions of paragraph 6 of the terms printed on the back of the carrier's bill of lading (all of which are quoted in the findings) as to bar the carrier from any claim for freight on any shipment which was not delivered at destination, even though delivery was made impossible through the destruction of the carrier's vessel by enemy action.
>
> "I am of the opinion that the above mentioned provisions of the bills of lading are not inconsistent. The provisions of its own bill of lading cited by the government, have to do with the 'evidence' that must be presented by the carrier to collect freight showing delivery to the proper person when delivery of the shipment has been made. The provisions of the carrier's bill of lading, which declares that the freight is payable 'goods or vessel lost or not lost', covers the liability of the shipper for freight if there is no delivery at all because the

goods have been destroyed through no fault of the carrier. The two provisions can thus be given effect in respect to the situations to which they apply: the one where there is a delivery of the shipment; the other where the shipment is lost." (Trans. R. p. 46).

The prevailing opinion of the Court of Appeals was written by L. HAND, C. J., J. P. FRANK, C. J., concurring. The dissenting opinion was written by A. N. HAND, C. J.

The majority took the position that the government bill of lading did "specifically" bar payment by the United States if the goods were not in fact delivered to the consignee. That decision was principally based on grounds and assumptions which were not urged or discussed in the briefs or oral arguments. (We shall point out the errors of that opinion later).

The dissenting opinion of A. N. HAND, C. J. takes up, one by one, the reasons advanced by the majority opinion and answers them.

It is believed that a summary of the grounds of the several decisions is difficult and would if properly done take as much space as the opinions themselves.

Reasons Relied on for Allowance of Writ

1. The decision below touches the terms under which innumerable government shipments were made just prior to and during the late war. The consequences of error in that decision not only affect the instant case but may and will have far reaching and serious results where government cargos were lost because vessels were lost through enemy action.

2. The government still uses, as it has since 1928, the "government bill of lading". If the decision below

is erroneous, an error of law is perpetuated which will materially affect every carrier whose ship carries government cargo on a government bill of lading.

3. The decision below erroneously creates a preferred position for the government among shippers and is discriminatory in favor of the government contrary to statute.

The prevailing opinion assumes that any particular shipper, including the United States, may, by special agreement with the carrier, avail itself of some sort of "privilege" given by the admiralty law to require the carrier to transport the cargo on the old basis that freight is not earned and payable unless the goods are delivered by the carrier at destination.

Such an assumption has no foundation when the carrier's charges and established terms of carriage contemplate that the risk of loss of freight shall be upon the cargo owners. The assumption fails to take into account the provisions of Sections 16 and 17 of the Shipping Act, 1916 (46 U. S. C. Secs. 815, 816), which, among other things, make it unlawful for any common carrier by water to make or give any undue or unreasonable preference or advantage to any person in any respect whatever or to allow any person to obtain transportation at less than the regular rates or charges then established and enforced on the line of such carrier and which also forbid carriers to demand, charge or collect charges which are unjustly discriminatory between shippers.

It is therefore clear that where the carrier's terms of shipment and charges are based on freight being earned upon shipment and, therefore, at shipper's risk, it would be unlawful for the carrier to discriminate in favor of any particular shipper by assuming the freight risk, at

least without making a reasonable extra charge. Furthermore, such terms would have to be made available to all shippers desiring to take advantage of them.

The statute makes no exception exempting the Government from the duties which it imposes on carriers and shippers alike. Nor does the statute permit the carrier to discriminate in favor of the Government.

The decision of the Court below not only permits but requires the carrier to so discriminate.

4. The decision of the Court below as evidenced by the prevailing opinion is so erroneous that it should be reviewed by this Honorable Court. The opinion of the District Court and the dissenting opinion in the Court below clearly point up the errors and in simple justice there should be a review by this Honorable Court. Two judges have decided for the petitioner, two for the government. The issue in the instant case has never before been adjudicated.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, commanding that court to certify to and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 21319, Alcoa Steamship Company, Inc., Appellee, against United States of America, Appellant, and that the judgment of the said Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that

your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Dated: New York, N. Y., July 29th, 1949.

ALCOA STEAMSHIP COMPANY, INC.,
Petitioner.

By MELVILLE J. FRANCE,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1948

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BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York (per Leibell, J.) (Trans. of R. p. 46) is reported at 80 Fed. Supp. 158.

The opinions in the United States Court of Appeals (Trans. of R. pp. 62-71) are not yet reported.

Jurisdiction

The order and judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on June 29, 1949 (Trans. of R. p. 72).

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

Statement of Facts

The facts have been stated in the petition.

Specification of Errors

It is submitted that the Court below erred:

(1) In reversing the decree of the District Court.

(2) In dismissing the petition (complaint) of the petitioner.

(3) In failing to hold that the bill of lading issued by the petitioner, providing for the payment of freight whether or not the vessel was lost, should prevail, because the clauses in the government bill of lading did not "specifically" provide otherwise.

Summary of Argument

The petitioner (who in this case is representative of every carrier carrying government goods on a government bill of lading) upon whose ship a government cargo was being carried under a government bill of lading, should be permitted to recover freight money from the government when its vessel and the cargo were lost by enemy action, where its commercial form of bill of lading provided that full freight "shall be deemed fully earned and due and payable to the Carrier * * * Goods or Vessel lost or not lost."

ARGUMENT.

The petitioner (who in this case is representative of every carrier carrying government goods on a government bill of lading) upon whose ship a government cargo was being carried under a government bill of lading, should be permitted to recover freight money from the government when its vessel and the cargo were lost by enemy action, where its commercial form of bill of lading provided that full freight "shall be deemed fully earned and due and payable to the Carrier * * * Goods or Vessel lost or not lost".

The Government Bill of Lading provides, among other conditions, the following:

> "2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier." (Exhibit Vol. p. 23a, Exhibit 9).

Under the Carrier's bill of lading (Article 6 quoted in the Summary Statement in the petition p. 4) there is of course no doubt that recovery would be permitted to the petitioner.

The question is whether it is "otherwise *specifically* provided or otherwise stated" on the government bill of lading.

As the dissenting opinion of A. N. Hand, C. J. accurately states:

The provision for the payment of freight whether or not the vessel was lost "now general in commercial bills of

lading must govern 'unless otherwise specifically provided or otherwise stated' in the government bill of lading. In other words, the company bill of lading should prevail unless clauses in the bill of lading *prepared by the government and therefore to be construed against it in resolving any ambiguities,* 'specifically' have provided otherwise." (Emphasis supplied.)

What does "specifically" mean?

It means with exactness and precision! (Webster International.)

It certainly does not mean by inference, by assumption, by supposition, by surmise, by indirection!

When by the Government bill it was desired to avoid a short statute of limitations contained in the carrier's bill it "specifically" said so! (Condition 7 of Government Bill, Exhibit 9.) When by the Government bill it was desired to avoid prepayment of freight permitted under the carrier's bill, it "specifically" said so! (Condition 1 of Government Bill, Exhibit 9.)

Should the Government bill of lading be any less specific if it was desired to avoid payment of freight when the cargo was not delivered? As Judge Leibell says: "it (the government) could have done so in a single sentence providing that no freight shall be payable if the shipment is lost." On the contrary not only was such provision *not specifically made* but *it was specifically omitted.* Condition 7 of the government bill of lading states:

> "7. In case of loss * * * in transit, the rules and conditions governing commercial shipments shall not apply as to period within which notice thereof shall be given the carrier or to period within which claim therefor shall be made or suit instituted." (Exhibit Vol. p. 23a, Exhibit 9.)

First and foremost it is submitted that the meaning of "specifically" has been completely overlooked in the prevailing opinion below. The court's argument is largely built upon assumption and inference. *It has even gone out of the record* and buttressed its conclusion with material improperly introduced in the respondent's brief in the Court below. We believe that it can be shown conclusively that the court below has completely disregarded the basic guide in this case: that unless *specifically* provided or otherwise stated in the government bill of lading the company bill of lading must prevail.

We shall discuss seriatim the several reasons for the conclusion of the Court below that the government bill of lading specifically overrode the provision of the carrier's bill of lading:

1. We consider unfounded the Court's conclusion that there is an inconsistency between the provision of the carrier's bill of lading that freight should be deemed earned on shipment and the provision of the Government bill of lading against collection of freight in advance or from the consignee. This conclusion is based not on any verbal inconsistency between the two provisions, *but wholly on the Court's assumption that there is no reasonable ground upon which to reconcile the two provisions.*

The Court suggests that there is "no reason why the United States * * * should wish to defer the payment of a claim which it must inevitably pay at some time".

In fact, an excellent reason is quite apparent to any one familiar with the cumbersome routine and delays inherent in the Government's own disbursing system. If the shipment or delivery of the Government's cargo were to be delayed pending the preparation and presentation

by the carrier and the auditing and payment of the Government vouchers necessary to obtain payment of advance or collect freight, it is obvious that the prompt despatch of the Government's shipments would be seriously jeopardized. To avoid such delays, the consequences of which might be especially grave in time of war, the Government bill of lading quite properly stipulates that the carrier shall not demand payment of its charges either in advance or at destination.

Thus a very practical and important effect can be given to Condition 2 of the Government bill of lading, without importing into its language any inconsistency whatever with the customary commercial stipulation in the carrier's bill of lading that the freight should be deemed earned on shipment. The latter stipulation affects merely the risk of loss, a subject on which the Government bill is entirely silent.

The Court's construction would do violence to the express purpose of Condition 2 of the Government bill, to make commercial terms govern the shipment unless they are "*specifically*" excluded by provisions or statements in the Government bill.

2. The Court below asserts that the Government bill of lading in that it states no "collection shall be made from the consignee", thus deprived the carrier of its ancient lien for freight. (As a matter of fact the company's bill of lading provided for its lien for freight and at most the Government bill of lading only "*specifically*" provided against such lien.)

The dissenting opinion of A. N. Hand, C. J. clearly shows the irrelevancy of this assertion:

> "The agreement that freight charges were to be paid only after delivery in cases where the voyage

had been successfully accomplished did not in terms affect the substantive right of the carrier to earn and ultimately to receive the freight, and related only to time of payment. It is true that the clause presupposes the loss of the carrier's lien because the latter was bound to deliver the cargo, in the absence of excusable loss, and to look only to the government for payment. But the loss of a lien was quite unimportant when the government was the obligor."

3. The Court below has come to the conclusion that "Condition" Number 1 of the Government bill of lading, read with the second "Instruction", "together constitute a carefully devised plan by which the United States, * * * asserted the privilege of any shipper under the admiralty law that it should not pay for what it does not get * * *."

The Court went on to say:

"Nor is this result unjust to, or hard upon, the petitioner. The law throws upon all carriers the risk of performance, for performance is a condition upon the shipper's promise to pay, just as performance is always a condition upon payment in any contract of service. True, it has become general for carriers to reverse this, and throw the risk upon the shipper; but, although we do not know why this has happened, surely there is ground for supposing that it may have been because of the carrier's superior bargaining position. So far as it has become a well settled custom, the burden may be distributed by insurance with that as a datum; but it was not unnatural for the United States, if its own insurer, to wish to have the privileges which the law gives to shippers in general."

It is respectfully submitted that the Court's conclusion overlooks the importance in the transaction of the well settled commercial practice that freight is earned on shipment, and the effect of the second of the "Conditions" in the Government bill making it "subject to the same rules and conditions as govern commercial shipments".

The Court quite correctly found that it is a well settled custom or practice for carriers to stipulate, as did the carrier in this case, that freight shall be deemed earned on shipment and thus to shift to the shipper the risk of loss of the benefit of its freight payment if delivery of its cargo at destination should be prevented by causes for which the carrier is not liable.

The Court suggests that such customary shifting of the risk may have come about "Because of the carrier's superior bargaining position".

It is respectfully suggested that no basis has been shown for such a suggestion, but even if such were the true explanation of the origin of the practice, it would be wholly irrelevant. The important fact is that there was such a well established or general practice which was incorporated into the terms of the carrier's bill of lading and that the charges and risks of the carrier and shippers, respectively, had been adjusted on the basis of the existence of that practice at the time the shipment of appellant's lumber was made.

It is now too late for the carrier to protect itself by insurance against the risk of loss of its freight which the Court's present opinion would place upon the carrier contrary to well established commercial practices.

Furthermore the carrier in this case carried this shipment at the same rate as was charged for commercial shipments under its regular bills of lading making the freight

earned upon shipment. Thus the carrier would be deprived both of the opportunity to insure itself against the risk of loss of freight but also of the opportunity to require additional compensation for this unusual assumption of risk.

It is submitted that, having in mind the express provisions of the Government bill of lading incorporating commercial rules and conditions, a court should be most reluctant, yes, refuse to reach a result so at variance with customary practices, especially when, as in this case, the terms of the Government bill of lading do not expressly require that result, when there is nothing unreasonable in the commercial practice and when to disregard it would result in a discrimination between shippers.

4. There is nothing inconsistent in the terms of the Government bill of lading with the "freight earned on shipment" clause in the carrier's bill of lading, neither is that clause in any way unreasonable. For hundreds of years carriers' bills of lading have customarily provided against the assumption of certain risks; such as loss by peril of the sea, which the law would otherwise impose on them and shippers have customarily insured their goods against such risks. The situation is well understood and the only practical result is that one group of underwriters, rather than another, receives the premium for taking the risk.

Ocean transportation, like any other commercial service, can only be maintained if the charges of the carrier produce revenue sufficient to cover the carrier's expenses and risks and to produce a profit.

Before it became the practice to make freight earned on shipment, one of the risks which the carrier assumed was the risk of loss of his freight revenue from a voyage

if he were prevented from delivering the cargo at its destination. Of course, this risk could be and was covered by insurance on freight, the premiums for which became part of the carrier's operating expense. In times of war, such insurance would have to include war risk insurance which would involve heavy premiums at a time of great war risk such as 1942. Obviously, however, even if the former practice still prevailed the shippers of goods would have to pay the cost of such insurance as one of the elements going to make up the total transportation charges of the carriers.

The effect of the now established general commercial practice to shift this risk to the owner of the goods does not in any way increase the total cost of transportation, but merely eliminates the premiums on freight insurance as part of the carrier's charges to the shipper and puts them among the shipper's insurance costs. In either case, the cargo owner and eventually the general public pays for the insurance or assumes the risk as part of the overall cost of the goods.

The arrangement does have the advantage of eliminating separate insurance on freight, is convenient to the shipper in the common case of C.I.F. shipments, and it also simplifies the adjustment of losses on voyages where casualties occur, particularly the adjustment of general averages, because the interests in the adventure are reduced from three—(ship, cargo and freight)—to two, (ship and cargo).

Moreover, the shipowner does not escape from any obligation which the law may forbid him to escape because if the cargo is lost by a cause not lawfully excepted in the bill of lading, the carrier is liable to the cargo owner for the latter's loss, which includes the loss of the freight.

5. The decision of the Court below would result in an injustice to the carrier and an unlawful discrimination in favor of the government.

This has been developed at length in the Reasons relied on for Allowance of Writ in the petition (p. 7).

6. The prevailing opinion buttresses itself in part by using the support of proof which is not in the record.

The Attorney General's Office improperly incorporated in its brief and argument a part of a letter which formed no part of the record of the trial but which is referred to in the prevailing opinion (Trans. R. p. 65). That letter has nevertheless, no doubt unwittingly, been used to reach and fortify the conclusion in the prevailing opinion. This is not a case of judicial notice. The incorporation of that letter violates elementary rules of procedure and practice.

The dissenting opinion (A. N. Hand, C. J.) sets forth the fact as it is:

"Moreover, only two months before the shipment in the case at bar the Comptroller General made a ruling regarding a shipment by the United States to the Philippines which apparently arrived shortly before the Japanese took possession, where the government and commercial bills of lading were identical with those we have under consideration. The Secretary of the Navy had asked for instructions from the Comptroller General as to whether he should pay the freight where the vessel had reached the Philippines, but there was no proof that the cargo had been received by the consignee or that the latter had receipted for it upon the bill of lading. The instructions of the Comptroller to the Secretary were as follows:

> "* * * you are advised that this office will not be required to object to the payment, otherwise proper of carrier's bills for transportation charges on shipments to the Philippine Islands or Guam in instances where the original bill of lading or other form of receipt showing delivery to the consignee cannot be obtained, if a satisfactory showing be made of facts or circumstances reasonably establishing the carriers' inability, by reason of war,

> to effect delivery and obtain a receipt from the consignee, where the claim in each instance is supported by a memorandum copy or shipping order copy of the bill of lading showing the material shipped and corresponding in pertinent detail with the memorandum copy duly signed by the carrier's agent and retained administratively as contemplated in the instructions on the reverse of the original bill of lading. * * *" [21 Comp. Gen. 909, 913.]

"Even though we do not regard the above ruling as controlling our interpretation of the bill of lading in the present case, it at least shows that the meaning of the government bill of lading was sufficiently doubtful to lead the Comptroller to treat the provisions of Condition 1 and instruction 2 as subject to exceptions and defenses where delivery could not be completed owing to war conditions."

It is submitted it appears clearly from the foregoing that the government bill of lading does not provide "*specifically*" against the collection of freight as provided and authorized in the carrier's commercial bill of lading. The Court below has fallen into serious error in the interpretation of a document which the United States is constantly using.

CONCLUSION.

A Writ of Certiorari Should be Granted.

Dated: New York, N. Y., July 29, 1949.

Respectfully submitted,

MELVILLE J. FRANCE